

No. 26-376

In the Supreme Court of the United States

BAYER HEALTHCARE LLC,

Petitioner,

v.

DONIECE DRAKE AND DEBORAH BOWLING,

Respondents.

**On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit**

**BRIEF OF THE PRODUCT LIABILITY
ADVISORY COUNCIL AS *AMICUS CURIAE* IN
SUPPORT OF PETITIONER**

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INTEREST OF THE *AMICUS CURIAE*¹

The Product Liability Advisory Council (PLAC) is a non-profit association of companies that constitute a broad cross-section of product manufacturers.² These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products and those in product supply chains.

PLAC's perspective is based on the experiences of members that span a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product litigation defense attorneys are sustaining (non-voting) members of PLAC.

Since 1983, PLAC has filed more than 1,200 briefs as *amicus curiae* in both state and federal courts, including this Court, on behalf of its members, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product risk management.

PLAC has a significant interest in the issue presented in this case because its members frequently are subject to suits alleging that products have been

¹ Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days before the due date of the intention of *amicus* to file this brief.

² PLAC's corporate members are identified on its website. See https://plac.com/PLAC/PLAC/Membership/Corporate_Membership.aspx.

misleadingly labeled—and application of a legally erroneous, lax class certification standard in those cases opens the door to improper class actions containing huge numbers of uninjured individuals. PLAC’s members also face putative class-action lawsuits filed by product purchasers alleging that the product contains a defect that *could* cause the product to malfunction, and who argue that individual issues of injury and damages do not preclude class certification. Again, class certification in such cases inevitably will include substantial numbers of uninjured class members.

The Ninth Circuit’s impermissibly lax approach to Rule 23(b)(3)’s predominance and superiority requirements permits certification of damages classes containing numerous uninjured members, even though the named plaintiffs have failed to prove that *any* absent class member has suffered injury sufficient to establish standing, much less identified any practical method for weeding out the uninjured individuals. That produces improperly certified class actions that harm not only PLAC’s members, but also their workers, customers, and shareholders, and the Nation’s economy.

PLAC consequently has a strong interest in this case and submits this brief to explain that this Court should grant review to prevent the significant harms resulting from the Ninth Circuit’s persistent and erroneous approach to class certification.

INTRODUCTION AND SUMMARY OF ARGUMENT

Class certification is a critical step in civil litigation. “Certification of a large class may so increase the defendant’s potential damages liability and litigation costs that he may find it economically prudent to

settle and to abandon a meritorious defense.” *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). Indeed, class-action litigation costs in the United States are astonishingly high, reaching a record \$4.5 billion in 2025. See *2026 Carlton Fields Class Action Survey*, at 6-7 (2026), <https://ClassActionSurvey.com> (*2026 Survey*). Because of the certification decision’s crucial significance, this Court requires courts to rigorously analyze whether class certification requirements are met.

In *TransUnion LLC v. Ramirez*, the Court held that each member of a Rule 23(b)(3) damages class must establish Article III standing (including by demonstrating concrete harm) to be eligible to recover damages. 594 U.S. 413, 423, 431 (2021). Because *TransUnion* reached the Court after a rare class-wide trial and final judgment, the Court expressly reserved the question of how courts should address putative class members’ standing at the class certification stage. *Id.* at 431 n.4 (citing *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1277 (11th Cir. 2019)). It subsequently granted certiorari to resolve this question in *Laboratory Corporation of America Holdings v. Davis*, 145 S. Ct. 1133, 1134 (2025), before dismissing the case as improvidently granted, 605 U.S. 327 (2025).

This case provides an excellent vehicle for the Court to resolve the question left unanswered in *Laboratory Corporation*, which continues to divide the courts of appeals. The decision below upheld certification of a damages class notwithstanding undisputed evidence that large numbers of class members (indeed, potentially all class members) lack the requisite Article III injury. Plaintiffs’ own experts indicated that they had no evidence that any member of the class was deceived by the challenged product label

and acknowledged that plaintiffs may not be able to establish that any class member paid a “price premium” to purchase the product. Yet the certified New York class seeks \$36 million in statutory damages, even though the combined New York and California sales of the product were less than \$2 million.

Without a viable method for determining injury on a class-wide basis, assessing whether each absent class member suffered the necessary injury is an inherently individualized inquiry. Class members would have to establish that they are the rare individuals who were misled by the label at issue and placed particular value on the purchase of a “natural” multivitamin. But the Ninth Circuit affirmed the certification of a damages class notwithstanding the absence of any practical method for assessing injury on a class-wide basis.

That violates Rule 23. When the named plaintiff cannot prove concrete injury on a class-wide basis, courts almost always should deny certification of damages classes containing uninjured class members. The nature of the individualized proof required to determine concrete injury, and the corresponding burdens on the parties and the court, means that in most cases the putative class cannot satisfy Rule 23(b)(3)’s predominance and superiority requirements. The proponent of a damages class must demonstrate that the uninjured class members can be weeded out before final judgment in a manner consistent with these Rule 23(b)(3) requirements and the defendant’s due process and Seventh Amendment rights. If it cannot, then the class cannot be certified.

The Ninth Circuit’s impermissibly lenient approach to class certification produces “[o]verbroad and incorrectly certified classes” that “threaten massive

liability” for class action defendants. *Laboratory Corp.*, 605 U.S. at 333 (Kavanaugh, J., dissenting from dismissal). The hydraulic settlement pressure that class actions impose on defendants encourages plaintiffs’ lawyers to propose inflated classes full of uninjured members—maximizing the potential total damages exposure and corresponding settlement leverage—regardless of how many class members suffered real-world harm and would be eligible to recover damages at final judgment.

The Court should grant review to make clear that Rule 23 bars this unlawful manipulation of the class action device.

ARGUMENT

I. This Court Should Review And Reverse The Ninth Circuit Rule Permitting Certification Of Damages Classes With Significant Numbers Of Uninjured Members Because Excluding Those Class Members Inevitably Requires Numerous Individualized Determinations.

This Court’s decision in *TransUnion LLC v. Ramirez* makes clear that *each* member of a certified damages class “must have Article III standing in order to recover individual damages.” 594 U.S. 413, 431 (2021). That is because “Article III does not give federal courts the power to order relief to *any* uninjured plaintiff, class action or not.” *Ibid.* (emphasis added) (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 466 (2016) (Roberts, C.J., concurring)).

When a named plaintiff has Article III standing and Article III standing for all class members can be determined on a class-wide basis, Article III and Rule 23 may permit class certification.

But in a large percentage of cases invoking Rule 23(b)(3), it is clear at the class-certification stage—based on the nature of the claims, the proposed class definition, and the undisputed class-certification evidence—that the putative class includes uninjured members who would lack standing to pursue their claims in federal court on an individual basis. When the named plaintiff cannot prove concrete injury on a class-wide basis, courts almost always should deny certification of damages classes containing uninjured class members. That is true regardless of whether the issue is characterized as one of standing or one of predominance and superiority.

Plaintiffs here sought to certify damages classes of California and New York consumers who allegedly were deceived by the label on certain “Natural Fruit Bites” multivitamins offered by Bayer HealthCare LLC from March 2020 to March 2022. By their own admission, plaintiffs’ experts had no evidence that any consumer was confused by the challenged label and had not determined whether their own proffered damages model would show that any consumer had paid a “price premium” for the multivitamins.

The Ninth Circuit nonetheless affirmed the certification of a class to pursue damages on the untested price-premium theory, as well as \$36 million in statutory damages for the class of New York consumers.

Bayer HealthCare LLC’s petition explains (Pet. 32-33) that allowing uninjured class members to pursue their claims on the merits in federal court raises serious constitutional concerns. Before certifying a class, and thereby exercising jurisdiction over the merits of the claims of absent class members, the district court must ensure that it has a basis to do so. After all, “[c]lass certification is the thing that gives

an Article III court the power to ‘render dispositive judgments’ affecting unnamed class members.” *Flecha v. Medicredit, Inc.*, 946 F.3d 762, 770 (5th Cir. 2020) (Oldham, J., concurring) (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995)). Individuals who could not pursue their claims in federal court on an individual basis should not be permitted to assert their claims through the expedient of the class device.

Separately, Rule 23(b)(3) itself will almost always bar certification of a damages class when injury cannot be determined on a class-wide basis and the proposed class includes uninjured individuals.

This Court has recognized that when individualized determinations are necessary to determine each class members’ damages, “[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class.” *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013).

An even greater obstacle to class certification arises when the proposed class includes uninjured individuals—because the requirements of Article III and Rule 23 will combine to bar class certification. The size of the class and the nature of the individualized inquiry necessary to establish each class member’s concrete injury will almost always prevent the court from determining that the proposed class satisfies the requirements that common issues “predominate” and class treatment is “superior” to other methods for “fairly and efficiently” adjudicating the controversy.

The Ninth Circuit failed to conduct the required analysis here. If it had, the class would not have been certified.

A. Rule 23(b)(3) requires rigorous analysis before certifying a damages class.

Class actions are an “exception to the usual rule” that cases are litigated individually; it therefore is essential that courts apply “rigorous analysis” to the requirements governing class certification before a lawsuit is approved for class treatment. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348, 351 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-701 (1979)). Moreover, this Court has repeatedly recognized that Rule 23 should be interpreted to guard against the potential for abuse of the class-action device. *E.g.*, *Comcast*, 569 U.S. at 33; *Dukes*, 564 U.S. at 367; *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 629 (1997).

The proponent of a damages class—in addition to satisfying the four requirements of Rule 23(a)—must satisfy Rule 23(b)(3). Rule 23(b)(3)’s predominance requirement mandates that “questions of law or fact common to class members predominate over any questions affecting only individual members.” Fed. R. Civ. P. 23(b)(3). The superiority inquiry, in turn, asks whether “a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” *Ibid.* District courts assessing compliance with Rule 23(b)(3) must consider, among other factors, “the likely difficulties in managing a class action.” *Id.* 23(b)(3)(D).

Because Rule 23(b)(3) is an “adventuresome innovation” that is “designed for situations in which class-action treatment is not as clearly called for,” courts have a “duty to take a close look at whether common questions predominate over individual ones.” *Comcast*, 569 U.S. at 34 (quotation marks and citations omitted). And “Rule 23 does not set forth a mere pleading standard.” *Dukes*, 564 U.S. at 350. A plaintiff

“must be prepared to prove that” the relevant class certification standards “are *in fact*” met for certification to be proper, *id.*, including through “evidentiary proof” that Rule 23(b)(3) is satisfied, *Comcast*, 569 U.S. at 33.

These Rule 23(b)(3) inquiries cannot be satisfied by a mechanical tallying up of common and individualized issues. Rather, they require “more of a qualitative than quantitative analysis.” *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1274 (11th Cir. 2019) (quotation marks omitted). And they require courts to “consider how a trial on the merits would be conducted if a class were certified,” to ensure that the case will not “degenerat[e] into a series of individual trials” that are incompatible with class treatment. *Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318, 326 (5th Cir. 2008) (quotation marks omitted). The “aim of the predominance inquiry is to test whether any dissimilarity among the claims of class members can be dealt with in a manner that is not inefficient or unfair”—which requires that “adjudication” of the individualized issues must be “both administratively feasible and protective of defendants’ Seventh Amendment and due process rights.” *In re Asacol Antitrust Litig.*, 907 F.3d 42, 51-52 (1st Cir. 2018) (quotation marks omitted).

B. A court’s Rule 23(b)(3) analysis must take account of the defendant’s right to identify and exclude uninjured absent class members.

The Rules Enabling Act and due process principles—and, where applicable, the Seventh Amendment—give a class action defendant the right to a judicial determination of whether absent class members have experienced real-world harm caused by the defendant’s conduct.

Due process does not just require that a plaintiff in federal court prove both Article III standing and every element of his claim to recover damages, but also that a defendant be given “an opportunity to present every available defense.” *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quoting *American Sur. Co. v. Baldwin*, 287 U.S. 156, 168 (1932)); see also, e.g., *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971) (recognizing that the “right to litigate the issues raised” in a case is “guaranteed * * * by the Due Process Clause”).

These due process rights do not change when a lawsuit is brought as a class action. The class action is merely a procedural device, “ancillary to the litigation of substantive claims.” *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 332 (1980); see also *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins.*, 559 U.S. 393, 408 (2010) (plurality opinion) (a class action “leaves the parties’ legal rights and duties intact and the rules of decision unchanged”).

Because due process precludes use of the class action mechanism to alter the substantive rights of the parties to the litigation, Rule 23’s requirements must be interpreted to honor that principle. As this Court put it, “a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its * * * defenses to individual claims.” *Dukes*, 564 U.S. at 367. Other courts have similarly recognized that defendants have “Seventh Amendment and due process rights to contest every element of liability and to present every colorable defense.” *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619, 625 (D.C. Cir. 2019); see *Asacol*, 907 F.3d at 53 (similar).

A contrary approach to class certification would also violate the Rules Enabling Act, which embodies

the due process principle that procedural rules cannot “abridge, enlarge or modify any substantive right.” 28 U.S.C. 2072(b); see *Dukes*, 564 U.S. at 367. The Rules Enabling Act’s “pellucid instruction that use of the class device cannot abridge any substantive right” bars courts from “giving plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action.” *Tyson Foods*, 577 U.S. at 455, 458 (quotation marks and alterations omitted); see also *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) (“[N]o reading of [Rule 23] can ignore the Act’s mandate that rules of procedure shall not abridge, enlarge or modify any substantive right.”) (quotation marks omitted); *Amchem*, 521 U.S. at 613 (“Rule 23’s requirements must be interpreted in keeping with * * * the Rules Enabling Act.”).

To comport with this clear mandate, the proponent of a damages class is required to demonstrate that uninjured class members can be weeded out prior to final judgment in a manner consistent with the defendant’s due process and Seventh Amendment rights and Rule 23(b)(3)’s standards. If the damages class proponent cannot make that showing, then the class cannot be certified.

Moreover, allowing a class to be certified without considering the need to prove absent class members’ real-world injury will—in nearly all cases—mean that disputed issues of injury are never resolved at all. That is because, after a district court reaches a final decision certifying a class, the case is highly likely to settle—and never reach a trial on the merits. See page 17, *infra*. Waiting until after trial to decide how the court and parties will address absent class members’ lack of concrete harm will in many cases force defendants to settle even if they have valid objections to

many putative class members' claims, effectively negating their due process right to raise "every available defense." *Lindsey*, 405 U.S. at 66 (quotation marks omitted).

Protecting defendants' rights in connection with challenges to absent class members' claims regarding the concrete injury required to establish standing, and sometimes also liability, is particularly important. As this case illustrates, the percentage of putative class actions in which at least some absent class members lack injury is high. That is reflected in the numerous recent decisions cited in Bayer's petition addressing this issue, as well as the number of petitions seeking to bring the issue to this Court. Pet. 15-20, 30.

C. Proper application of the predominance and superiority requirements will bar certification when individualized determinations are required to weed out uninjured class members.

In most cases where Article III injury cannot be determined on a class-wide basis, the individualized inquiries required will overwhelm any common questions, making clear that common issues do not predominate—and thereby properly precluding class certification.

There is rarely a simple test to identify and exclude uninjured class members, and the burden of such individualized determinations becomes greater as the size of the class grows. Without a "reliable means of proving classwide injury in fact," it is usually the case that "[c]ommon questions of fact cannot predominate." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252-253 (D.C. Cir. 2013).

Plaintiffs here plainly failed to demonstrate that injury could be established on a class-wide basis. Their own experts found no evidence that any member of the class was deceived by the product label and could not establish that *any* member paid a price premium, much less that a premium had been borne by each class member. See Pet. 36-38. At minimum, as Judge Forrest explained in dissent, there is “undisputed evidence that a substantial proportion of class members was not misled” by the challenged label. Pet. App. 10a.

Where the plaintiffs cannot show that all (or indeed any) absent class members were deceived by the label in question or paid a price premium, any remaining effort to prove injury is inherently individualized and highly fact-specific. See *Bowerman v. Field Asset Servs., Inc.*, 60 F.4th 459, 469 (9th Cir. 2023) (stating that, in a situation in which a putative class had failed to provide a reliable method for calculating injury and damages on a class-wide basis, “the class members were left relying on individual testimony to establish the existence of an injury and the amount of damages”).

In positing that “all class members were injured or they were not,” Pet. App. 4a, the Ninth Circuit majority failed to recognize, let alone address, that—due to the absence of a method to establish standing on a class-wide basis—thousands of individualized determinations would be required to winnow out the numerous uninjured individuals, who could be the vast majority of the class. “[I]f the predominance inquiry is to serve its critical function, it cannot be answered by ‘maybe,’ ‘perhaps,’ and other ‘what ifs’ that leave the hard questions for later or, worse, that ignore the questions that cut against certification.” *Speerly v.*

Gen. Motors, LLC, 143 F.4th 306, 324 (6th Cir. 2025). The Ninth Circuit majority committed that very error here.

Denying class certification when uninjured class members cannot be easily identified and excluded also is compelled by Rule 23(b)(3)’s superiority requirement—particularly Rule 23(b)(3)(D)’s directive to assess whether the class action will be manageable. That requirement ensures that defendants who do not succumb to settlement pressure are not forced to needlessly expend time and money litigating a certified class action through trial only for a court to conclude at final judgment that significant portions of the certified class lack standing.

Indeed, forcing a defendant to face the threat of gigantic damages liability and bear the burden of litigating through trial the claims of numerous uninjured class members is neither a “fair[]” nor “efficient[]” mechanism for “adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). The uninjured class members do not have an Article III case or controversy that belongs in federal court in the first place, so a federal class action cannot be a superior method to resolve their claims. And the need for thousands of individual mini-trials on each class member’s standing presents overwhelming and insuperable “difficulties in managing [the] class action.” *Id.* 23(b)(3)(D).

In sum, both predominance and superiority “require envisioning what a class trial would look like.” *Crutchfield v. Sewerage & Water Bd.*, 829 F.3d 370, 375 (5th Cir. 2016). For a damages class to satisfy Rule 23(b)(3) superiority, a “*fair* administration of the class claims” must “save the resources of both the court and the parties.” *Sacred Heart Health Sys. v. Humana Mil. Healthcare Servs., Inc.*, 601 F.3d 1159,

1184 (11th Cir. 2010) (quoting *General Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 155 (1982)) (alterations omitted). That requirement is not satisfied when, as in this case, weeding out uninjured class members consistent with defendants’ due process and Seventh Amendment rights would be enormously burdensome and time-consuming.

The decision below is just the latest in a long line of Ninth Circuit rulings that uphold class certification but fail to meaningfully address whether individualized trials to prove standing for the certified class’s thousands of members would predominate over common questions. The panel relied on the court’s en banc decision in *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 (9th Cir. 2022), where the Ninth Circuit affirmed certification of a class notwithstanding evidence that a significant portion of the class—potentially about twenty-eight percent of the class—had suffered no injury. See *id.* at 680-81; see also *id.* at 686 (Lee, J., dissenting).

The Ninth Circuit has relied on its holding in *Olean* to brush past the necessarily individualized inquiry required to weed out uninjured class members in numerous subsequent cases, including *Davis v. Laboratory Corporation of America Holdings*, 2024 WL 489288, at *2 n.1 (9th Cir. Feb. 8, 2024), in which this Court subsequently granted review. See Pet. 23-24 (identifying other decisions).

This case represents a particularly striking example of the Ninth Circuit’s impermissibly lax approach. The court expressly acknowledged that “all class members” may be uninjured and proceeded to certify the multimillion-dollar damages classes anyway. That result cannot be squared with the rigorous analysis Rule 23 requires.

II. The Ninth Circuit's Rule Opens The Door To An Avalanche Of Inflated Class Actions, Which Harm Businesses And The Judicial System.

The Ninth Circuit's cursory treatment of the problem of uninjured class members at the class-certification stage inflicts harm on a broad range of businesses, and ultimately on consumers, workers, and the entire economy.

The Ninth Circuit's ruling, if permitted to stand, makes it trivially easy for plaintiffs to obtain certification of classes with thousands or millions of members in cases involving claims of consumer label misrepresentations. It enables just about any consumer misrepresentation claim to give rise to a damages class action, even in the face of unrebutted evidence that large numbers of absent class members suffered no injury from the challenged labeling.

Under the Ninth Circuit standard, the need for individualized standing determinations to determine whether any injury was in fact suffered poses no obstacle to certification. And it incentivizes class-action plaintiffs' lawyers to bring a challenge on behalf of the broadest possible class, regardless of how many class members suffered any real-world harm. As a result, defendants routinely face the threat of gigantic damages liability and bear the burden of litigating through trial the claims of numerous uninjured class members, even though it is clear that neither injury nor damages ultimately could be resolved on a class-wide basis. Forced settlement payments are the inevitable result.

Impermissibly lax class-certification decisions like the ruling here "generate serious real-world

consequences.” *Laboratory Corp.*, 605 U.S. at 333 (Kavanaugh, J., dissenting from dismissal). Class-action litigation costs in the United States are huge. They hit a record high in 2025, totaling a staggering \$4.5 billion and exceeding \$4 billion for the second year in a row, continuing a trend of increases that started in 2015. See *2026 Survey* at 6-7. Consumer fraud and product liability suits represent almost a quarter of these lawsuits and associated litigation costs. See *id.* at 9.

Defendants in class actions already face tremendous pressure to capitulate to what Judge Friendly termed “blackmail settlements.” Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). As this Court explained nearly 50 years ago, “[c]ertification of a large class may so increase the defendant’s potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.” *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); see also *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (noting “the risk of ‘in terrorem’ settlements that class actions entail”); *Shady Grove*, 559 U.S. at 445 n.3 (Ginsburg, J., dissenting) (“[A] class action can result in ‘potentially ruinous liability.’”) (quoting Advisory Committee’s Notes on Fed. R. Civ. P. 23). That is particularly true when “[o]verbroad and incorrectly certified classes threaten massive liability” to class action defendants. *Laboratory Corp.*, 605 U.S. at 333 (Kavanaugh, J., dissenting from dismissal); see also *Olean*, 31 F.4th at 686 (Lee, J., dissenting) (noting that “[p]lunting this key question” regarding uninjured class members “until later amounts to handing victory to plaintiffs because this case will likely settle without the court ever deciding that issue.”).

That undue pressure is amplified dramatically in class actions like this one, where a claim seeks statutory damages and the potential liability—and the corresponding pressure to settle—is based on the overall number of class members rather than how many class members were actually injured by the defendant’s conduct.

The statute invoked by the members of the proposed class of New York consumers, a provision of the New York General Business Law, is one of many state and federal statutes that authorize statutory damages for alleged misrepresentations. As Judge Wilkinson put it in assessing a different statutory-damages law, “the exponential expansion of statutory damages through the aggressive use of the class action device is a real jobs killer.” *Stillmock v. Weis Markets, Inc.*, 385 Fed. Appx. 267, 276 (4th Cir. 2010) (Wilkinson, J., concurring specially).

Plaintiffs’ lawyers seeking to maximize their class-wide recovery have a strong incentive to seek statutory damages on behalf of the broadest possible class. “What makes these statutory damages class actions so attractive to plaintiffs’ lawyers is simple mathematics: these suits multiply a minimum \$100 statutory award (and potentially a maximum \$1,000 award) by the number of individuals in a nationwide or statewide class.” Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 114 (2009).

The class in this case seeks \$36 million in statutory damages on behalf of New York consumers, even though sales of the multivitamins at issue in both New York and California combined were less than \$2 million. See Pet. 6, 8. That demonstrates how combining minimum statutory damages with the class-action

mechanism can create potential liability wildly disproportionate to the actual harm, if any, allegedly caused by the defendant’s conduct. And these troubling consequences are even more pronounced when a proposed class is packed full of class members who experienced no real-world harm.

In addition, evidence from the class-settlement context indicates that the number of fraudulent claims has exploded in recent years, with the emergence of new software and artificial-intelligence tools making it easier for sophisticated bad actors to submit large numbers of fraudulent claims.

For example, one recent settlement of false-advertising claims against the maker of child car booster seats was halted because the claims process resulted in millions more claims for payment being filed *than car seats were ever sold*. See Diana Novak Jones, *Scammers flood US class action settlements with fraudulent claims*, Reuters (May 7, 2024), <https://perma.cc/3SFJ-TF7Z>. Sometimes even the lawyers submitting the claims admit that they have been duped into submitting fraudulent claims. See Mike Scarcella, *Law firm says fake claims were submitted in \$5.6 bln credit card settlement*, Reuters (May 28, 2024), <https://perma.cc/JP4J-CB9Z>. And a digital payment processor that works with claims administrators reported that more than *80 million* claims submitted in 2023 showed “significant” signs of fraud—an increase of over *19,000%* in just the two years since 2021. See Western Alliance Bank, *2024 Digital Payments Report*, <https://perma.cc/UB8J-VR8N>.

For all these reasons, defending and settling these lawsuits aimed at product-related representations and designed to extract lucrative settlements requires product sellers to expend enormous sums. PLAC’s

members, which frequently are targets of product-labeling and product-defect class actions, bear these costs directly. But the harmful consequences of this significant increase in the costs of doing business are not limited to businesses.

“[C]ompanies in turn pass on those costs to consumers in the form of higher prices; to retirement account holders in the form of lower returns; and to workers in the form of lower salaries and lesser benefits. So overbroad and incorrectly certified classes can ultimately harm consumers, retirees, and workers, among others.” *Laboratory Corp.*, 605 U.S. at 333 (Kavanaugh, J., dissenting from dismissal). The consequences of an overbroad and improperly certified damages class action are thus “widespread and significant.” *Ibid.*

The Court should grant review in this case to correct the Ninth Circuit’s improperly permissive approach to class certification that encourages unjustified and expensive class litigation without regard to the many adverse consequences both to businesses and to the rule of law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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